



Comptroller General
of the United States
Washington, D.C. 20548

K. Riback
145113

Decision

Matter of: Library Systems & Services/Internet Systems, Inc.
File: B-244432
Date: October 16, 1991

Pamela J. Mazza, Esq., Pillero, Mazza & Pargament, for the protester.
Gilbert J. Ginsburg, Esq., Epstein, Becker & Green, for Aspen Systems Corp., an interested party.
Vaughn E. Hill, Esq., and Suzanne Burnette, Esq., Department of Labor, and David R. Kohler, Esq., and Audrey H. Liebross, Esq., Small Business Administration, for the agencies.
Katherine I. Riback, Esq., John W. Van Chaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency decision not to set library services procurement aside for small business concerns was based on insufficient efforts to ascertain small business capability to perform the contract. Although numerous small businesses expressed an interest in the requirement, without contacting those firms to determine if they possess the necessary staff or were capable of hiring and retaining the necessary staff, the contracting agency concluded that no small businesses have the personnel to perform the contract.

DECISION

Library Systems & Services/Internet Systems, Inc. (Internet) protests the decision of the Department of Labor (DOL) to issue request for proposals (RFP) No. L/A 91-2 on an unrestricted basis. The protester contends that the solicitation should have been issued as a small business set-aside. The solicitation is for the management and operation of the Library at the DOL headquarters building in Washington, D.C. for 1 year with 2-option years.

We sustain the protest.

BACKGROUND

The DOL library, which consists of the main library and a law library, has been operated and managed since 1988 by Aspen Systems Corporation, which is not a small business. The library includes a collection of over 500,000 volumes, a current periodicals collection of approximately 2,000 titles and a large microfilm/fiche collection. According to the solicitation, the contractor is to provide all services to manage and operate the library, including circulation services and access to library materials, information, reference and research assistance services, receipt processing, cataloging, and preservation of materials, physical security and acquisition of informational materials for the library and other DOL offices. In addition, the contractor is to implement an automated library system, providing personnel, hardware and services for online patron access, serials control, and circulation control. The contractor also is to implement a collection development policy for the library which includes the evaluation and selection of materials required to maintain the DOL collection as a responsive information source tailored to the needs of the DOL staff.

The contractor is to provide all personnel to meet these requirements, including as key personnel, a project manager, collection development librarian, an acquisition librarian, a cataloger and a reference librarian, all of whom must have advanced library science degrees and extensive professional experience. The contractor also is to provide equipment, such as photocopying machines and supplies, microform reader/printers, and equipment necessary for automated serials control and circulation control and for access to online systems.

The initial synopsis of the solicitation in the Commerce Business Daily (CBD) identified the procurement as a 100 percent small business set-aside. An amended CBD notice removed the set-aside restriction. In response to the CBD notices, DOL received 48 inquiries including five from firms eligible for contract awards under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), four from small and disadvantaged firms and nine from small businesses. Most of the 48 businesses that responded to the CBD notices were from the Washington, D.C., Virginia and Maryland areas.

After DOL issued the solicitation on an unrestricted basis, Internet protested that pursuant to Part 29 of the Federal Acquisition Regulation (FAR), the solicitation should have been set aside exclusively for small business competition. Internet contends that there are a number of small business concerns, including itself, that have indicated that they

would submit offers if this procurement was competed as a small business set-aside, and that under the circumstances, the applicable regulations require that the solicitation be set aside.

Pursuant to the Small Business Act, 15 U.S.C. § 631 et seq., Part 19 of the FAR instructs contracting agencies to set aside certain acquisitions for exclusive small business competition. Section 19.502-1 of the FAR states in part:

"Using the order of precedence in 19.504, the contracting officer shall set aside an individual acquisition or class of acquisitions when it is determined to be in the interest of (a) maintaining or mobilizing the Nation's full productive capacity, (b) war or national defense programs, or (c) assuring that a fair proportion of Government contracts in each industry category is placed with small business concerns, and when the circumstances described in 19.502-2 or 19.502-3(a) exist."

Section 19.502-3(a) relating to partial set-asides is not relevant to this protest, while section 19.502-2 sets out what is referred to as the "rule of two":

"The entire amount of an individual acquisition or class of acquisitions . . . shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns . . .; and (2) awards will be made at fair market prices."

In this case, DOL declined to set aside the library requirement for exclusive small business competition for two reasons. First, DOL explains that FAR § 19.502-1 grants a contracting agency the discretion to decide whether or not to set aside a particular acquisition, even when the conditions set out in the "rule of two" in § 19.502-2 are met. According to DOL, since the other two conditions in FAR § 19.502-1--relating to maintaining or mobilizing full productive capacity and war and national defense programs--are inapplicable here, FAR § 19.502-1 only requires the contracting officer to apply the "rule of two" in FAR § 19.502-2 when it is determined to be in the interest of "assuring that a fair proportion of Government contracts in each industry category is placed with small business concerns." Here, DOL explains that it has exceeded its small business goals and, therefore, it has met the "fair proportion" requirement of FAR § 19.502-1. Under these circumstances, according to DOL's reading of FAR § 19.502-1,

the contracting agency is not required to apply the "rule of two" in FAR § 19.502-2.

Additionally, DOL maintains that even if the "rule of two" in FAR § 19.502-2 applies to this requirement, a set-aside was not required. According to DOL, it was not required to set aside the library solicitation because, pursuant to the "rule of two" in FAR § 19.502-2, the contracting officer determined that there was not a reasonable expectation of receiving offers for the requirement from two responsible small businesses. DOL reports that this determination was based on its experience and knowledge of contracting in the federal library community and its survey of small business library service firms and other government agencies which have contracts for library services.

ANALYSIS

We disagree with DOL's contention that FAR § 19.502-1 permits DOL to waive the "rule of two" in the circumstances of this case. In our view, DOL has not made the determination relating to a "fair proportion of Government contracts" permitted by FAR § 19.502-1 and FAR § 19.502-5 specifically prohibits DOL from declining to set aside this acquisition based on the agency's history of meeting its set aside goals.

First, even if DOL were permitted by FAR § 19.502-1 to decline to apply the "rule of two" when "a fair proportion of Government contracts in each industry category is placed with small business concerns," DOL has not made that determination.^{1/} In this respect, FAR § 19.502-1 refers to "Government contracts," not simply the contracts of a particular agency, and also refers to "contracts in each industry category." Here, DOL maintains that it is permitted to waive the "rule of two" since it has met its agency-wide small business set-aside goals. Nonetheless, since DOL did not determine that the federal government has awarded a "fair proportion" of contracts in the appropriate industry category to small business concerns, even under DOL's reading of the regulations, the agency has not made the determination required by FAR § 19.502-1.

^{1/} The contracting officer's contemporaneous documentation stated that "over the last several years OASAM and DAPP have more than met both small business and 8(a) goals." While other documents speak in terms of agency-wide goals, we are unable to find anything in the record which states that DOL has set aside a fair proportion of its contracts in the particular industry category applicable to library services.

Next, under the regulations, the determination which DOL says it made--that a fair proportion of DOL contracts have been awarded to small businesses--does not permit the agency to decline to set aside the library services contract. FAR § 19.502-5 states in part;

"None of the following is, in itself, sufficient cause for not setting aside an acquisition:

.

(f) Small business concerns are already receiving a fair proportion of the agency's contracts for supplies and services."

Thus, under FAR § 19.502-5, DOL is expressly prohibited from declining to set aside its library services contracts based solely on a finding that small businesses are already receiving a "fair proportion" of the agency's contracts.^{2/}

We next turn to the contracting officer's determination, pursuant to FAR § 19.502-2, that he did not have a reasonable expectation of receiving two offers from responsible small businesses.

After DOL issued the solicitation, the agency's small business procurement center representative (PCR) disagreed with the decision to issue the solicitation on an unrestricted basis. Later, the PCR and other representatives of the Small Business Administration (SBA) appealed the decision not to set aside the requirement for small business. The SBA pursued the matter at various levels within the DOL until the Deputy Secretary of Labor rejected the appeal. In support of its position, SBA provided DOL with a list of 59 small and small disadvantaged businesses that furnish library services, 17 of which are located in the Washington, D.C., Maryland, and Virginia areas. SBA also gave DOL the names of six firms that, according to the SBA, would submit proposals on the solicitation and six federal agencies which are satisfied with library support services provided by small businesses.

In response to the SBA's concerns, DOL's former librarian, who is the contracting officer's technical representative (COTR) on the current contract, contacted COTRs at three other federal agencies with contracts for total library services similar in size and scope to those needed by DOL. The COTR asked each agency whether their library services contractor is

^{2/} The agency has offered no explanation as to how this section of the FAR fits in with its interpretation of FAR § 19.502-1.

a small business and whether they knew of any small business library service firm that was currently operating a "total" federal library that included both public services (reference/research, collection/development and outreach) and technical services (cataloging/classification, acquisition and serials check-in). As a result of the survey, the COTR identified Internet as the only small business firm possessing the requisite capability to operate a total library.^{3/} Additionally, the COTR reviewed a qualification statement submitted by Zimmerman Associates, Inc., another small business, and determined that firm does not possess the capability to operate the DOL library.

The COTR also conducted a telephone survey of the six federal agencies named by the SBA. That survey yielded information on only three of the six small businesses on the SBA list. Although the COTR did not contact any of the small businesses that expressed an interest to SBA in submitting a proposal, DOL again concluded from the telephone survey of the other agencies that only Internet was capable of operating a "total" federal library.

The contracting officer concluded that a set-aside was not required because the list supplied by the SBA included only one small business, Internet, that in his view has performed all of the required functions and, because, based on communications with other agencies, he determined that other small businesses with federal agency library contracts were only performing limited portions of the total library operations. In initially justifying the determination not to set aside the requirement, the contracting officer also noted that a set-aside would eliminate the incumbent, a large business and would adversely affect pricing and, therefore, would not be in the government's best interest.

In a memorandum prepared by the COTR and in other documents, DOL has asserted additional reasons to justify its decision. For instance, the COTR explains that none of the small business firms with library service contracts at the agencies she contacted have operated entire government libraries and under only one of those contracts does the small business firm perform information retrieval, while the others provide

3/ In her memo relating the results of the phone survey, the COTR noted that:

"[there] may be other firms out there, unknown to the COTRs in my network, that are operating total Federal libraries but these libraries would not be comparable in size, scope or services to a departmental or agency library."

technical services only. The COTR explains that this is a significant drawback because the DOL contractor providing reference/research services must be able to attract and retain professionals who meet rigorous education and experience requirements. According to DOL, a company managing and operating a library with the research and reference requirements of the DOL library would need a core of qualified reference librarians available to fill temporary vacancies.

In addition, the COTR stresses that reference librarians in the DOL library provide reference/research support to all levels of agency staff and in the past year handled 11,000 reference inquiries, including 3,000 online searches. The COTR maintains that extensive familiarity with online data services and microcomputers is necessary and the contractor must have reference/research personnel able to interact with expert professional staff in all branches of technology and the social sciences.

The COTR also states that a staff of 15 to 20 persons is needed for the library and the current contractor is providing a staff of 15, half of whom are professional librarians with at least masters degrees while one holds a law degree and another has a doctorate in public administration. The COTR concludes that, based on this information and on DOL's experience and knowledge of the current contracting situation in the federal library community, with the exception of Internet, there are no small business library service firms currently operating federal libraries of the size, scope and complexity of the DOL library and there are none capable of providing the breadth and depth of services required under the contract.

An acquisition of services is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. FAR § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses with the capability to perform the work and we will review a protest to determine whether an agency has done so. The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. Id.

Here, we are not convinced that the record supports the contracting officer's determination that DOL's library operation and maintenance contract is beyond the capability of a small business. DOL stresses that the contract requires 15 to 20 persons, some with advanced degrees and extensive professional experience. The agency also emphasizes its concern that the contractor have a sufficient core of qualified personnel beyond those performing the DOL contract, particularly in the reference and research area, to provide temporary coverage for vacancies that may occur. Nonetheless, since the estimated annual price of the DOL library contract is only \$500,000, and the small business size standard applicable to this procurement is \$3.5 million, we think that it is possible that small businesses may have the resources to hire and retain the personnel required for the contract and also have a sufficient core of qualified personnel to assure coverage in the event of vacancies. In any event, the record includes no showing by DOL that any particular small business, other than Zimmerman and Associates, lack this capability.

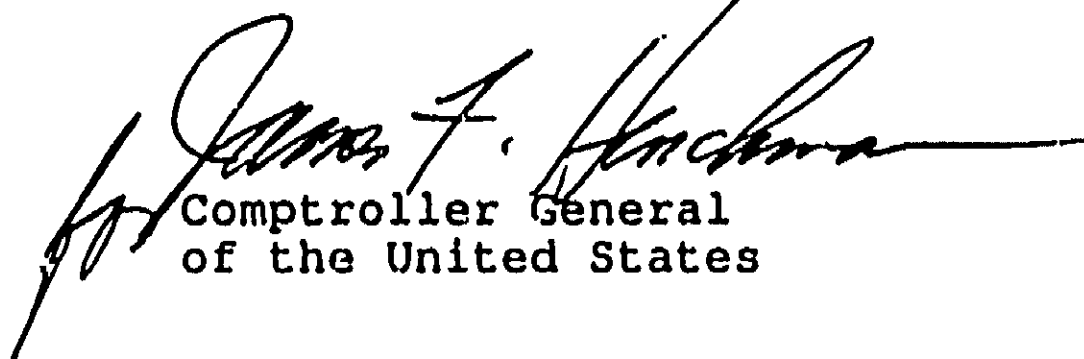
We think that DOL failed to make reasonable efforts to ascertain whether small business library service firms are capable of performing the contract. Aside from reviewing a qualification statement submitted by Zimmerman and Associates, DOL's survey of small businesses was limited to contact with other agencies. Although the SBA gave DOL the names of numerous other small business library service contractors, DOL contacted none of those firms. Additionally, DOL did not contact any of the numerous other small and small disadvantaged businesses from the Maryland, Washington, D.C., and Virginia areas that responded to the CBD notice.

DOL is certain that none of the small businesses that it is aware of have managed federal agency libraries of the size and scope of the DOL library. Nonetheless, without actually contacting at least a representative number of the small businesses that expressed an interest in this acquisition or that have successfully performed library service contracts for other agencies, we do not think DOL could reasonably determine that there are no small businesses capable of managing and operating the DOL library. Although DOL's primary concern is that its library services contractor have sufficient qualified personnel to support the library and to provide temporary coverage for vacancies, the record includes no examination of the existing personnel of any small business or an examination of the capability of any specific interested small business to hire and retain sufficient qualified personnel.

A detailed survey of possible small business offerors is not required in every case. See RBC, Inc., B-233589; B-233589.2, Mar. 28, 1989, 89-1 CPD ¶ 316. However, in this case, where numerous small businesses have expressed interest in the requirement and where the SBA identified other small businesses that are currently performing similar services for other federal agencies, we find that the contracting agency did not expend adequate efforts to determine the existence of small businesses capable of performing the contract. We do not think that it was sufficient for DOL to only contact the agencies. They are not always in a position to know, for example, a contractor's capability to expand to meet the requirements or if a contractor has a comparable private sector contract. Under the circumstances, we conclude that the decision not to set this procurement aside for exclusive small business competition was based on inadequate information.

The protest is sustained.

By separate letter of today to the Secretary of Labor, we are recommending that the contracting officer adequately investigate the potential small business interest in this procurement and, if he finds that there is a reasonable expectation that offers will be obtained from two responsible small business concerns (and that award can be made at a fair market price), the RFP should be amended to set aside this procurement for small business concerns. We also find that Internet is entitled to be reimbursed its protest costs, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).


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